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 8 **PUBLIC KEY PARTNERS**

FILED  
 OCT 6 2 04 PM '95  
 RICHARD L. CLARK  
 U.S. DISTRICT COURT  
 NO. DIST. OF CA, S.J.

9 **UNITED STATES DISTRICT COURT**  
 10 **FOR THE NORTHERN DISTRICT OF CALIFORNIA**

11 **ROGER SCHLAFLY,**

12 **Plaintiff,**

13 **v.**

14 **PUBLIC KEY PARTNERS and**  
 15 **RSA DATA SECURITY, INC.,**

16 **Defendants.**

**No. CV 94 20512 SW (PVT)**

**DECLARATION OF THOMAS R.**  
**HOGAN SUPPORT OF DEFENDANT**  
**PUBLIC KEY PARTNERS' MOTION FOR**  
**SUMMARY JUDGMENT, OR, IN THE**  
**ALTERNATIVE, PARTIAL SUMMARY**  
**JUDGMENT**

**Date: December 6, 1995**  
**Time: 10:00 a.m.**

17  
 18 I, Thomas R. Hogan, declare:

19 1. I am an attorney duly licensed to practice law in all the courts of the State of  
 20 California, and in this District, and I am the counsel of record for defendant Public Key  
 21 Partners. I make this declaration based upon personal knowledge, information and belief, and I  
 22 am competent to so testify if called as a witness.

23 2. On December 8, 1994, plaintiff Roger Schlafly filed an Amended Complaint in  
 24 this action. On January 6, 1994, defendants jointly filed a motion to dismiss that complaint  
 25 under Rule 12(b)(6) of the Federal Rules of Civil Procedure.

26 3. On February 7, 1995, after opportunity for briefing and argument, Judge Spencer  
 27 Williams, of the United States District Court, for the Northern District of California, issued a

28 **PKP'S MOTION FOR SUMMARY JUDGMENT**  
**OR ALTERNATIVELY, PARTIAL SUMMARY**  
**JUDGMENT**

1 issued a ruling granting in part and denying in part defendants' motion to dismiss. In that  
2 order, Judge Williams dismissed plaintiff's causes of action for fraud and libel without  
3 prejudice, directing plaintiff to amend his complaint by February 17, 1995. A true and correct  
4 copy of Judge Williams' Order is attached as Exhibit A to this declaration.

5 4. Plaintiff Schlafly did not amend his complaint to cure the deficiencies in his  
6 causes of action, and he has, therefore, waived any right to reallege them or the facts therein.

7 5. Attached as Exhibit B to this declaration are true and correct copies of relevant  
8 portions of Schlafly's deposition testimony that support PKP's Separate Statement of  
9 Undisputed Facts.

10 6. I declare under penalty of perjury that the foregoing is true and correct.

11  
12 DATED: October 6, 1995

  
Thomas R. Hogan

A

REC'D FEB 10 1995

FILED

FEB 8 1995

RICHARD W. WIEKING  
CLERK, U.S. DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN JOSE

UNITED STATES DISTRICT COURT  
FOR THE NORTHERN DISTRICT OF CALIFORNIA

8	ROGER SCHLAFLY,	)	CIVIL NO. 94-20512 SW
9		)	
10	Plaintiff,	)	ORDER GRANTING IN PART AND
11	v.	)	DENYING IN PART PUBLIC KEY
12	PUBLIC KEY PARTNERS and	)	PARTNERS' MOTION TO DISMISS
13	RSA DATA SECURITY, INC.,	)	OR, IN THE ALTERNATIVE, FOR A
14	Defendants.	)	MORE DEFINITE STATEMENT;
		)	GRANTING IN PART AND DENYING
		)	IN PART RSA DATA SECURITY,
		)	INC.'S MOTION TO DISMISS OR,
		)	IN THE ALTERNATIVE, TO STRIKE

Plaintiff Roger Schlafly, proceeding pro se, filed this action against Public Key Partners ("PKP") and RSA Data Security, Inc. ("RSA"), alleging a variety of causes of action arising out of certain actions both Defendants have taken with respect to patents they own. PKP moves to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure or, in the alternative, for a more definite statement under Rule 12(e). RSA moves to dismiss or, in the alternative, to strike. For the reasons expressed below, PKP's motion to dismiss is GRANTED IN PART and DENIED IN PART; and GRANT IN PART and DENY IN PART RSA's motion to dismiss.

**BACKGROUND**

The following statement of facts has been distilled from the more than 200 pages that comprised the original complaint and accompanying exhibits. In 1987, RSA filed a patent infringement action in the United States District Court for the Northern District of Illinois against Digital Signature and its partners, one of whom was Roger Schlafly. The patent at issue covered data encryption software that RSA licensed to others. Ultimately, Digital Signature and Schlafly entered into a consent judgment in which they agreed to an injunction against their making, using or selling any products implementing the patent.

In 1990, RSA and another corporation formed PKP. In January 1994, PKP learned that Digital Signature's successor in interest, Information Security Corp. ("ISC") was about to sell products to AT&T for resale, violating the terms of the consent judgment. Consequently, PKP wrote to AT&T and demanded that AT&T cease distribution and marketing of the allegedly infringing products.

Several months later, Schlafly wrote to PKP and demanded that PKP refrain from telling others that he had breached the consent judgment or had infringed patents. PKP wrote back, stating that Schlafly's letter was "defectively vague" and that he had admitted to infringing numerous patents.

Apparently unable to resolve the matter to his satisfaction, Schlafly filed this action in July 1994. On November 22, 1994, this Court granted PKP's motion for a more definite statement and granted RSA's motion to quash service of process. Subsequently, Schlafly

1 filed an Amended Complaint. The motions before the Court attack the  
2 sufficiency of the Amended Complaint.

### 4 DISCUSSION

#### 5 I. LEGAL STANDARDS

##### 6 A. Motion to Dismiss Under Rule 12(b)(6)

7 Under the liberal federal pleading policies, a plaintiff need  
8 only give defendant fair notice of the claims against it. Conley v.  
9 Gibson, 355 U.S. 41, 47, 78 S.Ct. 99, 102, 2 L.Ed.2d 80 (1957). A  
10 complaint should only be dismissed where, assuming all allegations  
11 as true in the light most favorable to plaintiff, it appears beyond  
12 doubt that no set of facts could support plaintiff's claim for  
13 relief. Id.; Durning v. First Boston Corp., 815 F.2d 1265, 1267  
14 (9th Cir. 1987), cert. denied, 484 U.S. 944, 108 S.Ct. 330, 98  
15 L.Ed.2d 358 (1987). Therefore, all factual questions in doubt are  
16 resolved in favor of plaintiff on this motion.

17 In deciding a motion to dismiss, the court is not limited by  
18 the allegations contained in the complaint if the complaint is  
19 accompanied by attached documents. Such documents are deemed part  
20 of the complaint and may be considered in determining whether the  
21 plaintiff can prove any set of facts in support of the claim.  
22 Durning, 815 F.2d at 1267. Finally, federal courts are required to  
23 liberally construe the inartful pleading of pro se litigants. See  
24 Ferdik v. Bonzelet, 963 F.2d 1258, 1261 (9th Cir. 1992) (citing Boag  
25 v. MacDougall, 454 U.S. 364, 365, 102 S.Ct. 700, 701, 70 L.Ed.2d 551  
26 (1982)).

1 B. Motion for a More Definite Statement under Rule 12(e)  
2 Rule 12(e) of the Federal Rules of Civil Procedure provides  
3 that:

4 If a pleading to which a responsive pleading is permitted is so  
5 vague or ambiguous that a party cannot reasonably be required  
6 to frame a responsive pleading, the party may move for a more  
7 definite statement before interposing a responsive pleading.  
8 The motion shall point out the defects complained of and the  
9 details desired. If the motion is granted and the order of the  
10 court is not observed within 10 days after notice of the order  
11 or within such other time as the court may fix, the court may  
12 strike the pleading to which the motion was directed or make  
13 such order as it deems just.

14 Fed.R.Civ.P. 12(e). The Federal Rules of Civil Procedure require  
15 all allegations to be "simple, concise and direct." Fed.R.Civ.P.  
16 8(e)(1). In addition, the complaint must be clear enough to provide  
17 the defendant with a sufficient basis to frame a responsive  
18 pleading. Fed. Savings & Loan Ins. Corp. v. Musacchio, 695 F.Supp.  
19 1053, 1060 (N.D.Cal. 1988).

## 20 II. ANALYSIS

21 PKP and RSA filed separate motions to dismiss. However, each  
22 joins the other's motion.

### 23 A. Plaintiff's Claim for Libel

24 Defendants contend that Plaintiff failed to comply with the  
25 portion of this Court's Order of November 22, 1994 relating to his  
26 libel claim (First Cause of Action). Specifically, they argue that  
27 Plaintiff has failed to identify the words giving rise to the libel  
28 claim and has not alleged that any libelous statement was directed  
at him.

1 Defendants are correct. The exhibits that appear to form the  
2 basis of Plaintiff's libel claim, Exhibits D and E, contain no  
3 reference to Plaintiff. Exhibit D, which is a letter from PKP to  
4 AT&T, complains about ISC's breach of the Consent Judgment of  
5 November 15, 1988, not Plaintiff's breach. Exhibit E, which is a  
6 letter from Jim Bidzos, RSA president, to the editor of Scientific  
7 American Magazine, makes no mention of Plaintiff whatsoever.

8 A review of Plaintiff's Amended Complaint also reveals that he  
9 has not identified any libelous statement that can be attributed to  
10 RSA. Plaintiff's Amended Complaint alleges that it is likely that  
11 RSA played a part in the creation of Exhibit D. Amended Complaint,  
12 ¶ 18. However, since nothing in that letter can be construed to  
13 libel Plaintiff, Plaintiff's claim against RSA fails.

14  
15 B. Plaintiff's Patent Invalidity Claim

16 PKP moves to dismiss Plaintiff's claim for patent invalidity  
17 (Second Cause of Action) on the grounds that (1) none of the  
18 exhibits support the claim; and (2) the factual basis of the claim  
19 is not credible. RSA argues that the claim must be dismissed  
20 because the patent at issue describes patentable subject matter.

21 PKP's arguments are without merit. The allegations as to each  
22 patent Plaintiff challenges specify both the patent and the basis  
23 for the challenge. See Amended Complaint, ¶¶ 22 (subject matter in  
24 Diffie-Hellman patent disclosed more than one year prior to filing  
25 application), 24 (same), 25 (Hellman-Merkle patent invalid because  
26 it is inoperative as disclosed), 28 (RSA patent fails test for  
27 patentability).

1 RSA's argument is also unpersuasive. Plaintiff's Amended  
2 Complaint alleges that the RSA patent preempts a mathematical  
3 formula. Amended Complaint ¶ 28. A mathematical formula or  
4 algorithm cannot be the subject of a patent. Gottschalk v. Benson,  
5 409 U.S. 63 (1972). Given Gottschalk, Plaintiff's allegation states  
6 a claim for patent invalidity.

7 According to RSA, the patent in question involves a means for  
8 encrypting messages using certain mathematical steps and  
9 relationships and is not simply a mathematical formula. However,  
10 when considering a motion to dismiss, the Court must assume the  
11 truth of Plaintiff's allegations. RSA's argument requires the Court  
12 to analyze the patent. Because of the complexity of the subject  
13 matter described by the patent, the Court cannot rule that, as a  
14 matter of law, it is not patentable. This issue is appropriately  
15 raised in a motion for summary judgment, not a motion to dismiss.

16  
17 C. Plaintiff's Patent Non-Infringement Claim

18 PKP moves to dismiss Plaintiff's claim for patent non-  
19 infringement (Third Cause of Action) on the grounds that (1) nothing  
20 in the exhibits accompanying the Amended Complaint supports the  
21 claim; (2) his reasoning is "convoluted;" and (3) that he  
22 mischaracterizes the facts. RSA contends that the claim must be  
23 dismissed because Plaintiff does not have standing to assert the  
24 non-infringement of the technologies on which the claim is based.

25 None of these arguments are persuasive. Because the Court must  
26 assume the truth of the allegations, the first two arguments are  
27 inappropriate.

1 As to the last argument, the allegations in Plaintiff's Amended  
2 Complaint and exhibits thereto are sufficient to confer standing.  
3 A federal court cannot consider a claim for declaratory relief  
4 involving patent rights and relationships unless (1) the patentee  
5 has taken action which creates a reasonable apprehension on the part  
6 of the declaratory plaintiff that it will be sued for infringement,  
7 and (2) the plaintiff is engaged in infringing activity or has taken  
8 concrete steps towards that end. BP Chemicals Ltd. v. Union Carbide  
9 Corp., 4 F.3d 975, 978 (Fed.Cir. 1993). Whether a declaratory  
10 judgment plaintiff has a reasonable apprehension of being sued is  
11 evaluated objectively and, in the absence of express charges of  
12 infringement, the court is to examine the totality of the  
13 circumstances. Shell Oil Co. v. Amoco Corp., 970 F.2d 885, 887  
14 (Fed.Cir. 1992).

15 RSA argues that Plaintiff has not satisfied the second part of  
16 the BP Chemicals test. However, according to the Amended Complaint,  
17 Defendants have claimed that ElGamal encryption as implemented in  
18 Plaintiff's product, SectretAgent, infringes PKP patents. Amended  
19 Complaint, ¶ 36. Thus, there is an allegation that Plaintiff is  
20 engaged in infringing activity.

21  
22 D. Plaintiff's Claim for Interference With Contractual  
23 Relationship

24 Defendants also argue that Schlafly's claim for interference  
25 with contractual relationship (Fourth Cause of Action) must be  
26 dismissed because the evidence on which he relies fails to support  
27 that theory. According to Defendants, the evidence on which the  
28

1 claim is based, Exhibit D, is nothing more than an effort on the  
2 part of PKP to protect its legitimate intellectual property rights.

3 Plaintiff's Fourth Cause of Action states a claim for  
4 interference with contractual relationship. As explained above, the  
5 Court must assume the truth of all of the allegations in the Amended  
6 Complaint on a motion to dismiss. Defendants' argument requires the  
7 Court to interpret the meaning of Exhibit D in a vacuum, in the  
8 absence of a full evidentiary record. It is not within the Court's  
9 province to do so on a motion to dismiss.

10  
11 E. Plaintiff's Claim for Fraud

12 Defendants argue that Plaintiff's claim for fraud (Fifth Cause  
13 of Action) is fatally defective in that they made no fraudulent  
14 promises to Plaintiff.

15 Defendants are correct. None of the exhibits on which  
16 Plaintiff relies contains any promise by PKP or RSA to Plaintiff.  
17 Exhibits K, R, X, AG, AH, AN are letters addressed to others.  
18 Exhibits F and J contain letters to ISC, which is not a party to  
19 this action. None of the exhibits or any of the allegations in the  
20 Amended Complaint provide any indication as to how Plaintiff was  
21 defrauded.

22  
23 F. Plaintiff's Claim for Unfair Business Practices

24 Defendants contend that the allegations in Plaintiff's Amended  
25 Complaint relating to his claim under California's Unfair Business  
26 Practices Act (Sixth Cause of Action) are conclusory, vague or  
27 contradicted by the exhibits he attached to the Amended Complaint.

1 Defendants' argument is unavailing. California's Unfair  
2 Business Practices Act prohibits "unfair, dishonest, deceptive,  
3 destructive, fraudulent and discriminatory practices by which fair  
4 and honest competition is destroyed or prevented." Cal. Bus. &  
5 Prof. Code § 17001. This language requires a complainant to allege  
6 what the defendant's allegedly unlawful practices are and how they  
7 are unlawful. Khoury v. Maly's of California, Inc., 14 Cal.App.4th  
8 612, 619, 17 Cal.Rptr.2d 708, 712 (1993). Plaintiff's Amended  
9 Complaint alleges that Defendants deceptively exaggerated the scope  
10 of their patents, unfairly negotiated with potential licensees in  
11 bad faith, fraudulently promised a reasonable and non-discriminatory  
12 licensing policy and threatened competitors. Amended Complaint, ¶¶  
13 74, 76, 78, 79. These allegations, which must be taken as true on  
14 a motion to dismiss, state a claim under California's Unfair  
15 Business Practices Act. Furthermore, they are sufficient to put  
16 Defendants on notice of Plaintiff's claim. The details can be  
17 fleshed out during the discovery process.

18  
19 G. Plaintiff's Antitrust Claim

20 Defendants also move to dismiss Plaintiff's antitrust claim  
21 (Seventh Cause of Action) because Plaintiff has failed to adequately  
22 define or otherwise allege the relevant geographical or product  
23 markets or the effect of the alleged restraint within such markets.

24 Plaintiff's allegations, liberally construed, state an  
25 antitrust claim. The Amended Complaint alleges two national product  
26 markets: cryptography software and public key cryptography. Amended  
27 Complaint, ¶¶ 81, 84. He further alleges that the PKP partnership  
28

1 agreement is evidence of a conspiracy to control and monopolize the  
2 public key cryptography market. Id. at ¶ 84. The Amended Complaint  
3 also contains allegations that PKP prevented competition between  
4 alternative public key technologies. Id. at ¶ 86. Several other  
5 allegations add factual support, giving Defendants sufficient notice  
6 of his claim. See id. at ¶¶ 87, 90, 91, 92, 95, 96.

7  
8 **CONCLUSION**

9 Plaintiff's claims for libel (First Cause of Action) and fraud  
10 (Fifth Cause of Action) are DISMISSED WITHOUT PREJUDICE. Should  
11 Plaintiff wish to amend his complaint to cure the deficiencies in  
12 these claims, he must do so by February 17, 1995. Defendants'  
13 motions as to Plaintiff's remaining claims are DENIED.

14 The Court further advises Plaintiff that Rule 11 of the Federal  
15 Rules of Civil Procedure obligates all parties to conduct a  
16 reasonable inquiry into the law and facts of a case before filing  
17 any court pleading. The rule also prescribes sanctions for  
18 violation of these obligations. Plaintiff is encouraged to read  
19 Rule 11 and to dismiss any of his claims that are untenable.

20 IT IS SO ORDERED.

21  
22 DATE: 2/7/95

  
SPENCER WILLIAMS  
United States District Judge

B



Weber & Volzing, Inc.  
Certified Shorthand Reporters

UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

ROGER SCHLAFLY,  
Plaintiff,

vs.

PUBLIC KEY PARTNERS  
and RSA DATA  
SECURITY, INC.,

Defendants.

No. CV 94 20512 SW (PVT)

CERTIFIED COPY

DEPOSITION OF ROGER SCHLAFLY

VOLUME I

Date: Monday, September 11, 1995

Time: 9:07 a.m.

Location: Law Offices of Thomas R. Hogan  
60 South Market Street, Suite 1125  
San Jose, California 95113

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SAN JOSE, CA 95113  
TEL. (408) 292-2573  
LICENSE NO. 2615

1 letter, Exhibit 4, ever in fact have any impact on  
2 your business relationship with either ISC or AT&T?

3 A I can't be sure of the extent of the effect.

4 Q Can you tell me what the effect was?

5 A Well, it -- it -- it caused them to be very  
6 cautious in dealing with us.

7 Q And what did they do that evidenced in your  
8 mind some caution?

9 A Well, as I said before, they asked for the  
10 consent judgment and -- and apparently did a review  
11 of the legal situation.

12 Q Okay. And when you say they apparently did a  
13 review of the legal situation, what do you base that  
14 on? Anything other than the fact that they asked for  
15 a copy of the consent judgment?

16 A That's primarily what I base it on.

17 Q Okay. In fact, your business relationship with  
18 ISC and AT&T was not affected in the slightest by the  
19 letter; isn't that true?

20 A I don't know the extent to which it was  
21 affected.

22 Q All right. Are you able to point to any impact  
23 this letter had on your business relationship with  
24 ISC or AT&T, any impact?

25 A Do you mean -- mean -- well, I -- I told you of  
26 impacts. You want quantifiable impact? It's hard to

1 second? We're getting a lot of pronoun problems  
2 here. You're referring to they, they, they a lot  
3 with reference to AT&T. Who at AT&T are you talking  
4 about? What individual?

5 THE WITNESS: Well, first of all, I  
6 should say I didn't personally have very many  
7 dealings with AT&T at all. But the people involved  
8 are Bill Franklin, and there was also somebody Greg  
9 Ranieri, someone in their legal department. Yes, his  
10 name is CCed on this letter.

11 MR. MOORE: Go ahead, Tom.

12 THE WITNESS: He had some involvement,  
13 also.

14 Q BY MR. HOGAN: After you became aware  
15 of this letter, Exhibit 4, did you have any  
16 conversations or communications at all with anybody  
17 from AT&T about the letter?

18 A Not directly.

19 Q And did the letter itself in fact have any  
20 impact at all in your business relationship with ISC  
21 or with AT&T? I mean as you've described it earlier.

22 A As I understand it, AT&T eventually came to the  
23 conclusion that the -- that the -- the claim that we  
24 violated the consent judgment was bogus.

25 Q Let me repeat my question, if I can. I don't  
26 think you answered it, Mr. Schlafly. Did this

STATE OF CALIFORNIA                    )  
                                               )  
 COUNTY OF SANTA CLARA                )                   SS..

I, MELINDA M. MC DONALD, a Certified Shorthand Reporter in and for the State of California, hereby certify that the witness in the foregoing deposition,

ROGER SCHLAFLY,

was by me duly sworn to tell the truth, the whole truth and nothing but the truth in the within-entitled cause, that the foregoing is a full, true and correct transcript of the proceedings had at the taking of said deposition to the best of my ability.

  
 Melinda M. McDonald  
 CSR #5249

Date: September 14, 1995

The signing of the deposition by the deponent was conditionally waived at the time of the taking of the deposition.

Upon completion of the foregoing transcript, the witness was notified it was ready for signature, but the deposition was not signed by the witness for the following reason: \_\_\_\_\_  
 \_\_\_\_\_  
 \_\_\_\_\_

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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

ROGER SCHLAFLY,  
Plaintiff,

vs.

PUBLIC KEY PARTNERS  
and RSA DATA  
SECURITY, INC.,  
Defendants.

No. CV 94 20512 SW (PVT)

CERTIFIED COPY

DEPOSITION OF ROGER SCHLAFLY

VOLUME II

Date: Tuesday, September 12, 1995

Time: 10:05 a.m.

Location: Law Offices of Thomas R. Hogan  
60 South Market Street, Suite 1125  
San Jose, California 95113

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1 any interference with your business relationships.

2 Do you see that?

3 A Yes, I do.

4 Q All right. And can you tell us any facts you  
5 have that support that allegation, namely, that the  
6 letter which is Exhibit 4 interfered with your  
7 business relationships?

8 A Just that it's more difficult to do business  
9 when someone else is saying that I'm -- I'm -- I'm  
10 violating consent judgments.

11 Q Do you have any facts to support this  
12 allegation?

13 A Other than that letter?

14 Q Yes, sir.

15 A That letter is most of my evidence.

16 Q Okay. Do you have any other evidence other  
17 than the letter?

18 A I'm not sure.

19 Q Okay. And when you say you're not sure, is  
20 that because you don't recall or what?

21 A No, because I'm not sure of all of the impacts  
22 of the defendants' actions.

23 Q Well, do you have any information that you have  
24 not already provided us concerning any impacts?

25 A No, I think I've provided the information.

26 MR. HOGAN: Paragraph 15 of your amended

STATE OF CALIFORNIA            )  
                                      )  
COUNTY OF SANTA CLARA        )            SS.

I, MELINDA M. MC DONALD, a Certified Shorthand Reporter in and for the State of California, hereby certify that the witness in the foregoing deposition,

ROGER SCHLAFLY,

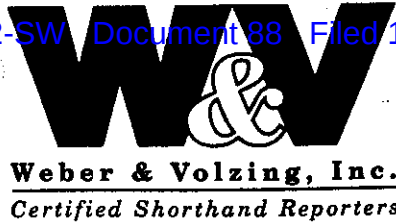
was by me duly sworn to tell the truth, the whole truth and nothing but the truth in the within-entitled cause, that the foregoing is a full, true and correct transcript of the proceedings had at the taking of said deposition to the best of my ability.

  
Melinda M. McDonald  
CSR #5249

Date: September 14, 1995

The signing of the deposition by the deponent was conditionally waived at the time of the taking of the deposition.

\_\_\_\_\_  
Upon completion of the foregoing transcript, the witness was notified it was ready for signature, but the deposition was not signed by the witness for the following reason: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_



UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

ROGER SCHLAFLY,  
Plaintiff,

vs.

PUBLIC KEY PARTNERS  
and RSA DATA  
SECURITY, INC.,  
Defendants.

No. CV 94 20512 SW (PVT)

CERTIFIED COPY

DEPOSITION OF ROGER SCHLAFLY  
VOLUME III

Date: Wednesday, September 13, 1995  
Time: 9:35 a.m.  
Location: Law Offices of Thomas R. Hogan  
60 South Market Street, Suite 1125  
San Jose, California 95113

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1 in the area of enhancement or maintenance to -- to  
2 SecretAgent or products that I would receive some  
3 sort of royalty on.

4 Q All right. Actually, that raises another  
5 question. With respect to the assignment of rights  
6 in Crypt Master to ISC, were you to receive a  
7 royalty, based on those sales?

8 A Yes.

9 Q Now, I don't want to -- I mean, I would prefer  
10 to use your words, so let's see if we can, you know,  
11 put the right tag on this. At some point, you  
12 started doing shall we call it software development  
13 for ISC, software development and maintenance? What  
14 shall we call it?

15 A I was -- software development, improvement,  
16 maintenance, some combination.

17 Q Was this all in the cryptography area?

18 A Yes.

19 Q And was this an exclusive relationship with  
20 ISC? In other words -- let me start with this  
21 question. Have you ever done cryptography software  
22 development, improvements or maintenance for anyone  
23 other than ISC? And to put it in a time frame, I  
24 know your testimony regarding Digital Signature, but  
25 I'm now talking about after -- since 1990.

26 A No.

## Deposition of Roger Schlafly - Volume III

1 says: "RSA Data Security's grand scheme is to  
2 monopolize the U.S. public key market, promote RSA as  
3 an international standard, and to collect a royalty  
4 on every key by requiring that licensed software use  
5 only keys certified by them."

6 What's the basis for your statement  
7 regarding RSA Data Security's grand scheme?

8 A Okay. This is my construction of what they are  
9 doing, based on what I've put together from observing  
10 their actions.

11 Q All right. And what actions were those?

12 A Okay. Well, let's go through them one at a  
13 time. To monopolize the public key market, I  
14 consider the formation of Public Key Partners an  
15 attempt to monopolize the U.S. public key market by  
16 putting -- by an attempt to put all use of public key  
17 technologies under control of one licensing  
18 authority.

19 Q Anything else?

20 A Promote RSA as an international standard.

21 Q No, no.

22 A Oh, you don't want --

23 Q No, no, no. Grand scheme to monopolize the  
24 U.S. public key market. You've given me one example,  
25 which is the formation of PKP. Were there any  
26 others?

Deposition of Roger Schlafly - Volume III

1 A Well, it's my impression from the way they do  
2 business that they're trying to control the public  
3 key market as much as they possibly can.

4 Q Are you making that statement based on what  
5 you've learned subsequent to this letter or on what  
6 you knew prior to your having written this letter?

7 A Well, I --

8 Q I mean, we're going to go back to your amended  
9 complaint and we'll deal with each one of your more  
10 recent allegations in turn. I'm trying to find out  
11 at the time you wrote this letter what the basis was  
12 for your statement that RSA's grand scheme was to  
13 monopolize the U.S. public key market. You've given  
14 me one example, which is the formation of PKP.

15 A Okay. At the time I wrote this letter, that  
16 was probably the primary example I had in mind.

17 Q At the time you wrote this letter, what was  
18 your understanding of what a licensee of the PKP  
19 patents received?

20 A What a licensee received?

21 Q Yes.

22 A A PKP licensee?

23 Q Right. Let me ask it in a different way. What  
24 was your understanding -- was a PKP licensee required  
25 to practice RSA, or could such a licensee practice  
26 any one of a number of different cryptosystems?

STATE OF CALIFORNIA            )  
                                          )  
COUNTY OF SANTA CLARA        )

SS.

I, MELINDA M. MC DONALD, a Certified Shorthand Reporter in and for the State of California, hereby certify that the witness in the foregoing deposition,

ROGER SCHLAFLY,

was by me duly sworn to tell the truth, the whole truth and nothing but the truth in the within-entitled cause, that the foregoing is a full, true and correct transcript of the proceedings had at the taking of said deposition to the best of my ability.



Melinda M. McDonald  
CSR #5249

Date: September 15, 1995

The signing of the deposition by the deponent was conditionally waived at the time of the taking of the deposition.

Upon completion of the foregoing transcript, the witness was notified it was ready for signature, but the deposition was not signed by the witness for the following reason: \_\_\_\_\_

\_\_\_\_\_  
\_\_\_\_\_



UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

ROGER SCHLAFLY,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. CV 94 20512 SW (PVT)
	)	
PUBLIC KEY PARTNERS	)	
and RSA DATA	)	
SECURITY, INC.,	)	
	)	
Defendants.	)	
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DEPOSITION OF ROGER SCHLAFLY  
VOLUME IV

Date: Monday, September 18, 1995  
Time: 9:46 a.m.  
Location: Law Offices of Thomas R. Hogan  
60 South Market Street, Suite 1125  
San Jose, California 95113

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SAN JOSE, CA 95113  
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1 A Yes.

2 Q And why did you send it at this time?

3 Actually, let me preface that question with a  
4 different question. Mr. Fougner's letter that you're  
5 referring to here was dated almost three months  
6 earlier; right?

7 A Yes.

8 Q And AT&T had already responded to that letter;  
9 correct?

10 A That appears to be the case, based on the dates  
11 of the exhibits that you've handed me.

12 Q Well, was that your understanding at the time,  
13 at the time you wrote this letter, Exhibit 54?

14 A Well, I'm not sure I knew about AT&T's  
15 response, but I -- even if I had known about it, I  
16 would have felt that this is something that I should  
17 respond to, anyway.

18 Q All right. So why did you do this at this time?

19 A Okay. You asked me earlier when I received a  
20 copy of the letter contained in Exhibit 45.

21 Q Yes, I did.

22 A And I said I wasn't sure. And I'm still not  
23 sure, but I think it's likely the case that I  
24 received that shortly before writing this letter.

25 Q All right. Did you ask anyone at AT&T whether  
26 the January 12 letter which we have marked as Exhibit

1 45 -- did you ask anyone at AT&T whether Exhibit 45  
2 had had any effect on the relationship between ISC  
3 and AT&T?

4 A No.

5 Q Did you ask anyone at ISC whether Mr. Fougner's  
6 January 12 letter, which again is Exhibit 45, had had  
7 any impact on the relationship between AT&T and ISC?

8 A I may have. I don't recall.

9 MR. MOORE: Let's have this marked as  
10 Exhibit 55.

11 (Whereupon, Defendant's Exhibit 55 was  
12 marked for identification.)

13 THE WITNESS: Okay.

14 Q BY MR. MOORE: And not to create any  
15 confusion, but while you were reviewing Exhibit 55, I  
16 thought of a different question for Exhibit 54.

17 Would you mind switching back to that document?

18 Thank you.

19 A No problem.

20 Q The first sentence in Exhibit 54 is that "I  
21 have heard that you have been telling people that I  
22 have breached a consent judgment or that I have  
23 infringed patents." What people did you hear Mr.  
24 Fougner had told?

25 A I only have heard evidence that he told AT&T.  
26 I was concerned that if he had told AT&T, he might

1 have told others, as well.

2 Q To this day, are you aware of any other persons  
3 that Mr. Schlafly (sic) told?

4 A Mr. Fougner told.

5 Q I'm sorry, Mr. Fougner told. A Freudian slip.  
6 Other than AT&T and ISC.

7 A I believe that -- that in -- Venn had told me  
8 that in talking to customers, he has a couple of  
9 times heard from customers that there was some legal  
10 doubt or cloud or question or something about the  
11 SecretAgent product. But I don't know exactly where  
12 that came from and I don't have any hard evidence of  
13 it.

14 Q Mr. Venn would be the source of that  
15 information?

16 A Yes.

17 Q All right. Let's turn our attention to  
18 Exhibit 55.

19 A Okay.

20 Q Have you -- had you seen this document prior to  
21 its being produced in the course of discovery?

22 A I don't think so.

23 Q Around this time frame, April, 1994, did Mr.  
24 Ranieri contact you?

25 A No.

26 Q Did anyone from AT&T contact you?

STATE OF CALIFORNIA            )  
                                          )            SS.  
COUNTY OF SANTA CLARA        )

I, MELINDA M. MC DONALD, a Certified Shorthand Reporter in and for the State of California, hereby certify that the witness in the foregoing deposition,

ROGER SCHLAFLY,

was by me duly sworn to tell the truth, the whole truth and nothing but the truth in the within-entitled cause, that the foregoing is a full, true and correct transcript of the proceedings had at the taking of said deposition to the best of my ability.

  
Melinda M. McDonald  
CSR #5249

Date: September 19, 1995

The signing of the deposition by the deponent was conditionally waived at the time of the taking of the deposition.

\_\_\_\_\_  
Upon completion of the foregoing transcript, the witness was notified it was ready for signature, but the deposition was not signed by the witness for the following reason: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_



UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

ROGER SCHLAFLY, )  
 )  
Plaintiff, )  
 )  
vs. )  
 )  
PUBLIC KEY PARTNERS )  
and RSA DATA )  
SECURITY, INC., )  
 )  
Defendants. )  
\_\_\_\_\_ )

No. CV 94 20512 SW (PVT)

ORIGINAL

DEPOSITION OF ROGER SCHLAFLY  
VOLUME VI

Date: Friday, September 22, 1995  
Time: 8:48 a.m.  
Location: Law Offices of Thomas R. Hogan  
60 South Market Street, Suite 1125  
San Jose, California 95113

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1 clipping is attached to your amended complaint as an  
2 exhibit; isn't that right?

3 A Yes, I believe so.

4 Q And where did you get it?

5 A From ISC.

6 Q Is it ISC's practice to forward press clippings  
7 of this nature to you?

8 A Yes.

9 Q And what is the purpose of their doing that?

10 A Just to help keep me informed of the industry,  
11 as far as I know. And when Venn sees an article  
12 about SecretAgent or something like that, he often  
13 forwards it to me.

14 Q All right. Now, I take it that this particular  
15 article is attached to your complaint because of its  
16 reference in the center article to the headline and  
17 the story, "NIST Approves DSS Despite Threat of a  
18 Patent Lawsuit." Is that right?

19 A Yes.

20 Q Would you describe for me to the extent you  
21 know the controversy with NIST and the DSS, the  
22 digital signature standard?

23 A Well, there were several controversies. The  
24 one in particular that's mentioned in this article is  
25 the claim that PKP apparently views the practice of  
26 the DSS as an infringement of PKP patents. And the

1 government, specifically NIST, approved the DSS as a  
2 standard, with a statement that use of the standard  
3 is -- is royalty-free and in their opinion, free of  
4 patents, except for their own patent, which they're  
5 not charging a royalty on.

6 Q This article -- oh, strike that. What's your  
7 understanding of which PKP patents form the basis of  
8 the dispute with NIST, if you have such an  
9 understanding?

10 A My understanding is that it's based on the  
11 Diffie-Hellman patent, the Hellman-Merkle patent and  
12 the Schnorr patent.

13 Q Not the RSA patent, correct, to your knowledge?

14 A That is my understanding.

15 Q All right. The focus of this article appears  
16 to be that NIST went ahead and approved DSS as a  
17 federal information processing standard, despite the  
18 controversy with PKP. Is that a correct reading of  
19 this article?

20 A Yes.

21 Q What's your understanding of the present status  
22 of that?

23 A It hasn't changed since this article, as far as  
24 I know.

25 Q So NIST is proceeding, despite PKP's patent  
26 threats; is that right?

1 A Well, it is -- it is still a -- a FIPS  
2 standard. FIPS stands for Federal Information  
3 Processing Standard.

4 Q You designed software for ISC which  
5 incorporated the DSS some time ago; isn't that right?

6 A Yes.

7 Q Has ISC to your knowledge ever refrained from  
8 selling any of its DSS products because of the  
9 controversy with -- between NIST and PKP?

10 A I don't know.

11 Q These DSS products are now part of the products  
12 that AT&T is selling to end users; is that right?

13 A Yes.

14 Q To your knowledge, has AT&T ever refrained from  
15 selling any DSS products because of the controversy  
16 between NIST and PKP?

17 A I'm not sure. There -- there -- there was a  
18 point where AT&T was -- was doing some sort of --  
19 well, I think they were doing some sort of legal  
20 investigation of the DSS patent issues. It's  
21 possible they delayed some sales somewhat. I'm not  
22 sure.

23 Q You don't know; is that your testimony?

24 A Yes.

25 Q What is your understanding or impression of the  
26 impact of the dispute between NIST and PKP on the

1 cryptography market?

2 A I think it's likely that the -- the threat of a  
3 lawsuit that's mentioned in this article deterred  
4 others from using the DSS.

5 Q But it did not deter you; is that right?  
6 Because you designed products that featured DSS.

7 A That's correct.

8 Q As a matter of fact, when NIST approved DSS,  
9 despite the threat of the lawsuit, you, ISC and AT&T  
10 were in the unique position of already having  
11 products that it could sell; correct?

12 A Unique that we were the only ones --

13 Q Yes.

14 A -- that had products?

15 Q Well, let me revise the question. One of only  
16 a few other companies in the cryptography market that  
17 had DSS products.

18 A Yes, that's correct.

19 Q Would it be fair to say that the patent  
20 controversy because NIST disregarded PKP's patent  
21 threats actually gave ISC and AT&T and you a jump on  
22 the competition?

23 A Well, first of all, I wouldn't say that NIST  
24 disregarded the threats. I mean, they apparently  
25 took them seriously and negotiated with PKP for some  
26 period of time.

1 Q Right. And then NIST went ahead, despite the  
2 patent threats; correct?

3 A Eventually, yes, after -- after a couple of  
4 years or so.

5 Q And to the best of your knowledge, isn't the  
6 fact that ISC and AT&T are one of the few companies  
7 that has DSS products prominently featured in AT&T  
8 marketing literature?

9 A Yes.

10 MR. MOORE: All right. Let's move on to  
11 Clipper. And just to give ourselves a point of  
12 reference here, I'd like to have this marked as  
13 Exhibit 66.

14 (Whereupon, Defendant's Exhibit 66 was  
15 marked for identification.)

16 THE WITNESS: Okay.

17 Q BY MR. MOORE: Mr. Schlafly, again,  
18 this is one of the documents that's attached to your  
19 amended complaint; isn't that right?

20 A Yes.

21 Q And where did you get a copy?

22 A I believe I got it from RSA Data Security.

23 Q How did you go about doing that?

24 A I believe they mailed it to me.

25 Q Did you call and ask for a copy?

26 A No.

1 the original complaint, did you discuss the  
2 possibility of bringing a lawsuit with anyone?

3 A Yes, I believe I discussed it with my brothers  
4 and with ISC.

5 Q Who at ISC?

6 A I believe it came up in connection with Venn,  
7 Markowitz and DeVita.

8 Q Whose idea was it that you would be the  
9 plaintiff?

10 A My idea.

11 Q Is that the way you and ISC discussed it, that  
12 you would be the plaintiff?

13 A They're not a party to the lawsuit.

14 Q Oh, I understand that. Was there ever any  
15 discussion that they would be a party to the lawsuit?

16 A They had no interest in being a party to the  
17 lawsuit.

18 Q Did they tell you their reasons?

19 A Yes.

20 Q What were their reasons?

21 A I'm trying to think if this is confidential.  
22 Can we say attorneys' eyes only?

23 Q Yes, by all means, if you wish.

24 A Okay.

25 Q We'll put it that way and we can argue about it  
26 later if I have a problem with it?

STATE OF CALIFORNIA                    )  
                                          )  
COUNTY OF SANTA CLARA            )                    SS.

I, MELINDA M. MC DONALD, a Certified Shorthand Reporter in and for the State of California, hereby certify that the witness in the foregoing deposition,

                  ROGER SCHLAFLY,  
was by me duly sworn to tell the truth, the whole truth and nothing but the truth in the within-entitled cause, that the foregoing is a full, true and correct transcript of the proceedings had at the taking of said deposition to the best of my ability.

  
Melinda M. McDonald  
CSR #5249

Date: September 23, 1995

The signing of the deposition by the deponent was conditionally waived at the time of the taking of the deposition.

\_\_\_\_\_  
Upon completion of the foregoing transcript, the witness was notified it was ready for signature, but the deposition was not signed by the witness for the following reason: \_\_\_\_\_  
\_\_\_\_\_  
\_\_\_\_\_



UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

ROGER SCHLAFLY,	)	
	)	
Plaintiff,	)	
	)	
vs.	)	No. CV 94 20512 SW (PVT)
	)	
PUBLIC KEY PARTNERS	)	
and RSA DATA	)	
SECURITY, INC.,	)	CERTIFIED COPY
	)	
Defendants.	)	
	)	

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DEPOSITION OF ROGER SCHLAFLY  
VOLUME VII

Date: Thursday, September 28, 1995  
Time: 9:42 a.m.  
Location: Law Offices of Thomas R. Hogan  
60 South Market Street, Suite 1125  
San Jose, California 95113

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1 A I think those -- well, those products are now  
2 being --

3 Q That is sold by AT&T.

4 A They're sold by AT&T.

5 Q All right. I can change the question. Are you  
6 involved in AT&T's pricing decisions?

7 A No.

8 Q Does --

9 A I'm not.

10 Q I'm sorry. Does AT&T set the prices for --

11 A Yes, they do.

12 Q That question and answer is not going to make  
13 sense, Mr. Schlafly, because I didn't quite finish  
14 the question. Does AT&T set the prices for the  
15 software that you license to ISC and ISC licenses in  
16 turn to AT&T?

17 A I'm not sure what you mean by that. I get paid  
18 a royalty on sales.

19 Q Right.

20 A So the sales price of the product is determined  
21 by AT&T.

22 Q Right. That is what I was getting at.

23 When you say that RSA has the power to  
24 fix prices, do you mean prices are fixed artificially  
25 high or artificially low? Actually, that's almost  
26 two questions. Does RSA set prices artificially

1 high, in your view?

2 A To say that a company has monopoly power means  
3 as I understand it that they have the capacity or the  
4 ability to set prices above or below what would  
5 otherwise be the market price, but doesn't  
6 necessarily mean that they do it.

7 Q All right. Do you have any understanding one  
8 way or the other as to whether RSA sets prices  
9 artificially high?

10 A No, I don't.

11 Q Do you have an understanding as to whether RSA  
12 sets the prices artificially low?

13 A No, I don't.

14 Q Okay. Let's turn to paragraph 83. One thing  
15 that I'd like probably to clarify first, it says:  
16 "Defendant PKP has pooled patents in an attempt to  
17 monopolize public key technologies," but later in  
18 paragraph 84, you state that PKP was formed by RSA  
19 and Cylink.

20 So going back to paragraph 83, which  
21 entities in your view have pooled patents? Is it  
22 defendant PKP or is it RSA and Cylink, who formed PKP?

23 A Well, I'm not sure there's a distinction. It  
24 was RSA and Cylink that decided to pool the patents  
25 in forming PKP, and then it was PKP that then had  
26 control of the patent pool.

1 you can keep the encryption key public and the  
2 decryption key can be secret. In symmetric or secret  
3 key or whatever, a non-public key cryptography  
4 system, the decryption key also has to be secret, but  
5 it's the same as the encryption key, so the  
6 encryption key has to be kept secret, also.

7 Q In April, 1990, when PKP was formed, how  
8 prevalent was public key cryptography in the  
9 cryptography market, if you know?

10 A If you're asking in dollar share of the market  
11 or something, I don't know. Certainly everyone was  
12 convinced that public key cryptography was the wave  
13 of the future and what everyone would eventually go  
14 to.

15 Q At the time, that is, April, 1990, public key  
16 cryptography was viewed as the wave of the future;  
17 does that properly characterize your testimony?

18 A Yes, yes.

19 Q Where is it now?

20 A Well, I'd say it's still on the increase. I  
21 mean, it hasn't taken over completely. Not everyone  
22 has switched to it. I don't know. You're asking me  
23 if it's still the wave of the future?

24 Q No, I think you answered my question. Do you  
25 have anything else to add to that answer? Let me ask  
26 you this. Has the cryptography market itself changed

1 from April, 1990 to the present?

2 A I don't have any hard figures for you. I'd  
3 say that the cryptography market as a whole has been  
4 growing for thirty years. It's -- it's -- and the  
5 importance of the market that's been devoted to  
6 public key cryptography is also growing. Currently  
7 it seems to be driven largely by increased use of  
8 networks among computers. And a lot of people, more  
9 and more people see that cryptography is the way to  
10 solve certain network security problems.

11 Q Has the emergence of the so-called Information  
12 Superhighway impacted the cryptography at all?

13 A As I was just saying, the information -- the  
14 increased use of networks creates greater demand for  
15 cryptography. The Information Highway is a broad  
16 term for various computer networks that -- that  
17 connect all of the computers.

18 Q Let's go to paragraph 85, the last sentence of  
19 which states: "In the alternative, plaintiff argues  
20 that the patent pool is unlawful under the rule of  
21 reason, because of its anticompetitive intent and  
22 effect." What is the basis for your statement that  
23 the patent pool was the result of anticompetitive  
24 intent?

25 A My basis is that it appears to me that the  
26 whole purpose of forming Public Key Partners was to

1 put the public key patents under one licensing  
2 authority.

3 Q And how is that anticompetitive?

4 A It's anticompetitive because I think it's ended  
5 up restricting the usage of different public key  
6 technologies. I think if it weren't for that, we  
7 would have seen more use of -- of -- of say ElGamal  
8 type cryptography, which could have been licensed  
9 directly by Cylink or Stanford or whomever, and that  
10 ElGamal technologies would have had -- would have  
11 given more competition for RSA.

12 Q Why?

13 A Why?

14 Q Why would ElGamal have given more competition  
15 to RSA if ElGamal could be licensed directly from  
16 Cylink or Stanford?

17 A Well, I think there would have been a healthy  
18 competition between RSA and ElGamal, that -- that --  
19 that -- that if most people were using RSA, Stanford  
20 or Cylink or whoever's controlling those patents  
21 would -- would -- would have been able to say to  
22 customers, look, we have this competitive technology.  
23 You can license these patents and then do ElGamal  
24 cryptography. We'll license them on better terms or  
25 cheaper or something else, whatever -- whatever would  
26 make the -- such a license more palatable to

1 customers. And that would have made some competition  
2 between ElGamal and RSA.

3 Q Have you ever sold any cryptography software  
4 directly to a customer?

5 A No.

6 Q Do you have any understanding of the factors  
7 that go into a cryptography customer's decision to  
8 buy a particular software product, cryptography  
9 software product?

10 A Well, I have a general idea.

11 Q All right. And what factors are those?

12 A They're interested in security, reliability,  
13 ease of use, price, compatibility with other software  
14 or hardware, speed and efficiency of the software.  
15 Those are the main issues.

16 Q Is ElGamal perceived to be as secure as RSA?

17 A Perceived by --

18 Q Customers.

19 A -- users, experts?

20 Q Users, not experts.

21 A Well, I don't think very many users are  
22 familiar with ElGamal.

23 MR. MOORE: Let's take a break.

24 THE WITNESS: Okay.

25 (Whereupon, a recess was taken from 10:45  
26 to 10:55 a.m.)

1 received --

2 A Yes.

3 Q -- from ISC?

4 Do you have an estimate of the extent to  
5 which ISC's sales were diminished as a result of this  
6 particular restraint?

7 A No.

8 Q Is there a reason -- and the reason that you  
9 don't have such an estimate is that it's hard to say,  
10 because there's -- because no one that you're aware  
11 of had a similar product in the marketplace?

12 A Yes, that's correct.

13 Q All right. Are there any other reasons that  
14 make it difficult to make that estimate?

15 A Well, it's hard for me to estimate this market  
16 because I wasn't actively selling to end users,  
17 anyway. Maybe ISC could give an estimate of that.

18 Q All right. We may have gone through this last  
19 Friday, and I apologize if I'm repeating myself. But  
20 ISC declined to join the lawsuit --

21 A Yes.

22 Q -- for a variety of reasons; right?

23 A Yes.

24 Q At the time that you filed this complaint, the  
25 AT&T and ISC arrangement was in place; right?

26 A Yes.

1 Q And AT -- and so that permitted ISC to sell  
2 software through AT&T and under the auspices of the  
3 AT&T -- of AT&T's PKP patent license; right?

4 A Yes.

5 Q And now AT&T is selling ISC software under its  
6 own name in competition with RSA; true?

7 A That AT&T is?

8 Q Yes.

9 A Yes.

10 Q To the extent that the defendants have  
11 succeeded in restraining competition, doesn't that  
12 benefit AT&T in selling ISC software?

13 A Because AT&T has a -- a license to the PKP  
14 patents?

15 Q Right.

16 A And -- and -- and whatever limitations on  
17 patent licenses might deter other competitors from  
18 getting into the market?

19 Q Right.

20 A That's possible.

21 Q Okay. Let's turn to paragraph 87. The first  
22 sentence says: "Defendant PKP acquired the Schnorr  
23 patent in a willful attempt to maintain its monopoly  
24 over public key technology, in violation of section 2  
25 of the Sherman Antitrust Act." What monopoly power  
26 did PKP have?

1 A It controlled the three Stanford patents and  
2 the one MIT patent, and it collectively alleged that  
3 set of patents controls all public key technology,  
4 and therefore, since they were the exclusive  
5 licensing authority on those patents, that they had a  
6 monopoly over public key technology.

7 Q Did PKP sell any products? I realize it sold  
8 sublicenses to patents.

9 A Right.

10 Q Did it sell any cryptography products?

11 A PKP itself was only a patent licensing agency.

12 Q Did RSA have a monopoly power over public key  
13 technology?

14 A Well, you're getting into the issue of who is  
15 the real monopolist here, PKP or RSA Data Security.

16 Q Right. You might recall that briefs were filed  
17 in this case because we were having trouble  
18 understanding your antitrust allegations, and that is  
19 really what all of these questions are directed to.  
20 We're trying to understand your allegations. Who's  
21 the real monopolist with respect to a section 2  
22 Sherman Act claim? What are your allegations?

23 A Well, what it says here is PKP.

24 Q I realize that. And is that your position as  
25 you sit here today?

26 A Well, it's admittedly somewhat confusing in

1 the patent problem; correct?

2 A Yes.

3 Q Were there any other reasons?

4 A Yes. There's also the reason that I'm  
5 primarily a developer and not a marketer. And  
6 there's also the reason that I have a relationship  
7 with ISC and AT&T that -- that I wouldn't want to  
8 interfere with.

9 Q All right. What steps did you take to resolve  
10 the patent problem? Actually, strike that. Because  
11 I think I know the problem. The steps that you took  
12 -- the steps that you took to resolve the patent  
13 problem was your inquiry regarding PKP's patent  
14 licensing policies in -- in the end of 1990; right?

15 A Well, I say this lawsuit's an attempt to  
16 resolve the patent problem.

17 Q That may be true. Prior to this lawsuit, your  
18 attempt to resolve the patent problem was your  
19 attempt -- your inquiries about licensing at the end  
20 of 1990?

21 A I think an inquiry -- inquiry is a more  
22 accurate description than an attempt to resolve it.

23 Q Yes, inquiry is the word that I meant to use,  
24 if that's not the word I used. And we've already  
25 covered your inquiry about PKP's licensing policies  
26 at that time in this deposition, haven't we?

1 A Correct.

2 Q Do you have any economics training?

3 A I've read a couple books on the subject.

4 Q And which books are those?

5 A I don't remember. I'm not claiming to have any  
6 special expertise in economics. I mean, it's a  
7 subject I try to be generally knowledgeable of,  
8 but --

9 Q Fair enough. How did you estimate two million  
10 dollars in damages?

11 A I just --

12 Q Actually, let me ask you a different question  
13 before we get to the two million dollar question.  
14 These damages, is it your contention that they were  
15 essentially caused by the various antitrust  
16 allegations that -- starting with paragraph 81?

17 A No, not entirely. I think it's --

18 Q All right. In your view, what caused the two  
19 million dollars of damages? Which aspects of the  
20 antitrust cause of action caused it?

21 A How much of the two million is due to antitrust  
22 assertions?

23 Q That's right.

24 A I -- I -- I don't know. I never made a  
25 detailed analysis of which -- of -- of which  
26 allegations lead to which damages. There -- there is

1 some overlap among the allegations.

2 Q All right. Maybe we should go back to the two  
3 million dollar question. How did you estimate two  
4 million dollars?

5 A I just -- that's just kind of a raw number I  
6 came up with. I kind of thought I needed of some  
7 number in here.

8 Q Did you just pull it out of thin air?

9 A Well, pretty much.

10 Q All right. Did you have something in mind as  
11 to the source of the damages? Would it be lost  
12 royalties from ISC, for example, as is referenced  
13 here?

14 A No, I think I sort of had in mind what my  
15 software could be sold for if there's -- the market  
16 for such software had been more favorable to me.  
17 That is, if there weren't these patent problems and  
18 these other problems.

19 Q Then what elements contribute to your estimate  
20 of damages?

21 A I just -- you know, I just -- it's just a  
22 number that I thought was reasonable.

23 Q Well, I understand that you thought the number  
24 was reasonable. But what I want to get is whatever a  
25 more accurate number might be, I want to know the  
26 factors that would contribute to a more exact

1 estimate of that number. For example, is lost  
2 royalties from ISC a part of what you consider to be  
3 your damages?

4 A Yes.

5 Q Is lost sales in the form of sales of your  
6 software to end users a part of what you consider to  
7 be your damages?

8 A Well, there were some lost opportunities  
9 there. How much that contributes to the damages, I  
10 don't know.

11 Q All right. What lost opportunities?

12 A Well, just that if there weren't these patent  
13 problems, I could have -- I could have gone after  
14 other possible sales.

15 Q Would those sales have been to end users of  
16 your software?

17 A It's possible.

18 Q Would those lost opportunities have been to  
19 other companies like ISC, who would in turn sell your  
20 software to end users?

21 A I think it's possible.

22 Q Is any other source of damages possible?

23 A That's the bulk of it.

24 Q I don't think I've ever asked this question,  
25 but what is the royalty rate that you are paid by  
26 ISC?

STATE OF CALIFORNIA           )  
                                           )  
 COUNTY OF SANTA CLARA       )

SS.

I, MELINDA M. MC DONALD, a Certified Shorthand Reporter in and for the State of California, hereby certify that the witness in the foregoing deposition,

ROGER SCHLAFLY,

was by me duly sworn to tell the truth, the whole truth and nothing but the truth in the within-entitled cause, that the foregoing is a full, true and correct transcript of the proceedings had at the taking of said deposition to the best of my ability.



Melinda M. McDonald  
 CSR #5249

Date: September 29, 1995

The signing of the deposition by the deponent was conditionally waived at the time of the taking of the deposition.

Upon completion of the foregoing transcript, the witness was notified it was ready for signature, but the deposition was not signed by the witness for the following reason: \_\_\_\_\_

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